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Defining a relevant market? Better get your experts ready

By Beth L. Fancsali and James J. Hegarty*

Relevant market definition is a core concept that goes to the very heart of antitrust analysis. A decade ago, a trial judge in West Virginia wrote that such core antitrust concepts “are as much a matter of economics as they are of law” and went on to note that it is “virtually unthinkable” to litigate these matters without economic testimony.¹ Nonetheless, not everyone has thought the same, and cases often are litigated with a market definition based on lay testimony and corporate documents. The few appellate courts that have addressed the issue have come to opposite conclusions: the Eleventh Circuit requires expert market definition analysis² but the Tenth Circuit has affirmed a ruling that does not.³

Late last year, the Sixth Circuit entered the debate concerning the intersection between expert economic testimony and market definition. In *Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing, Inc.*,⁴ the court sided with the Eleventh Circuit. In that case, the Sixth Circuit not only held that expert economic testimony on behalf of the plaintiff is necessary to define a relevant market, but also established strict admissibility standards that the expert testimony must meet. This opinion underscores the importance of economics in reaching the heart of the relevant market definition and the potentially grave consequences of foregoing this analysis.

The Kentucky Speedway case

The plaintiff in the Sixth Circuit case was Kentucky Speedway, the owner of a race track built to host stock car and other auto races. Kentucky Speedway sued NASCAR, which sanctions large and small stock car races, and International Speedway Corporation, an owner of racetracks that host NASCAR

events, for Section 1 and 2 antitrust violations. Kentucky Speedway alleged two relevant markets: (1) a market for sanctioning major or “Sprint Cup” races; and (2) a market for hosting those races. Kentucky Speedway offered expert testimony from an economist to support its relevant market allegations, but the court found that the expert failed to employ a sufficient analysis to support those market definitions. Employing a *Daubert* analysis, the court excluded Kentucky Speedway’s expert because he failed to properly employ the “reasonable interchangeability” test to determine the scope of the markets.⁵ In particular, Kentucky Speedway’s expert failed to consider whether other sports and entertainment events were substitutes for Sprint Cup races. The district court noted that “a family [of four] might patronize a Bengals or Reds game or some other sports event, instead of a [Sprint Cup] race,” if the price of Sprint Cup race tickets was raised.⁶ A rigorous and economically sound study should have taken these other possible substitutes into consideration. In addition, to the extent the expert considered substitutes for Sprint Cup races, he failed to use accepted or peer reviewed methods to measure the cross-elasticity of demand. Instead of using a widely accepted measure, such as the Small but Significant Non-transitory Increase in Price or “SSNIP” test set forth in the DOJ’s Merger Guidelines, the Kentucky Speedway expert focused on changes in ticket prices and attendance figures over an eight-year span. His method of analysis had not been tested or subjected to peer review, leaving the impression that it was produced solely for the purposes of the litigation. Once the expert’s opinion was excluded, Kentucky Speedway was left with in-

ternal NASCAR marketing documents and testimony from lay witnesses, anecdotal and unscientific evidence the trial court and Sixth Circuit found to be insufficient to define the relevant markets.⁷

Kentucky Speedway’s lessons regarding relevant market definition proof

The Sixth Circuit’s opinion in *Kentucky Speedway* focuses the light back on expert economic analysis as key to defining a relevant market. Both the expert and the economic components of this holding are important. Some lower courts previously had espoused positions at least sympathetic to the Eleventh Circuit view that expert testimony is required to establish a relevant market definition.⁸ At least one other court, however, had explicitly rejected a rule that expert testimony is mandatory for relevant market definition and that the absence of such analysis is automatically fatal to an antitrust claim.⁹ The latter approach leaves the door open to reliance upon internal corporate documents where business people often use the word “market” generically or in myriad and sometimes conflicting ways, referring to a geography or to a product line or subset or even to a particular set of customers with that one word. The lay meaning of “market,” even if clear from the anecdotal evidence, differs markedly from the economic definition of a relevant market that is at the core of antitrust law.¹⁰

The second part of *Kentucky Speedway’s* lesson is that an expert’s methods matter. On the issue of market definition, some litigants proffer experts who rely extensively on internal corporate descriptions or ma-

Continued on page 2 nipulations of price data without con-

ducting an economically sound and tested analysis. This appears to have been the case in *Kentucky Speedway*. An expert opting to use novel or untested methods of measuring interchangeability risks criticism and attack that he has employed an outcome-driven approach for litigation.

Conclusion

The *Kentucky Speedway* opinion reaffirms the critical importance of expert economic analysis to relevant market definition. While an absolute rule mandating expert economic testimony may not be expressly followed in every Circuit, the new Sixth Circuit opinion reflects the trend towards more rigorous economic standards in found recent anti-trust cases, including those addressing class certification.¹¹ Economic market analysis is important not only for trial, but also at earlier stages of pleading, class certification, and summary judgment.¹²

Plaintiffs cannot afford to dismiss the *Kentucky Speedway* holding lightly, even though the cost and time required to conduct a through economic analysis concerning cross-elasticity of demand can be great. The consequences of reliance on the defendant's own statements to the exclusion of sound economic analysis in pleading and proving a relevant market can be devastating to an antitrust claim. Defendants also should be

prepared to challenge a plaintiff's economic analysis with their own experts whose analysis meets the same rigorous standards. While a defendant may not want to "prove" an alternative definition of a relevant market, its experts can and should use accepted methods of economic analysis to chip away at or refute the plaintiff's alleged definition. And so, we have a strong, new endorsement of the decade old view that proving key anti-trust concepts such as relevant market definition is "unthinkable" without solid expert economic analysis. ■

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1. *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 98 F.Supp.2d 729, 736 (W.D. Va. 2000) (quoting George A. Hay, *The Economist as Expert Witness in Expert Witnesses*, 335 (Faust F. Rossi ed. 1991)).

2. *Colsa Corp. v. Martin Marietta Servs., Inc.*, 133 F.3d 853, 855 n.4 (11th Cir. 1998) (construction of a relevant economic market cannot be based upon lay opinion testimony).

3. *Lantec v. Novell*, 146 F.Supp.2d 1140, 1148 (D. Utah 2001), aff'd, 306 F.3d 1003 (10th Cir. 2002).

4. *Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908 (6th Cir. 2009).

5. The district court also struck the report and testimony of a second economist who had not conducted his own interchangeability analysis, but instead simply concurred with the first ex-

pert's market analysis.

6. *Kentucky Speedway*, 588 F.3d at 917.

7. *Id.* at 919.

8. *Drs. Steuer & Latham, P.A. v. National Medical Enterprises, Inc.*, 672 F. Supp. 1489, 1512 n.25 (D.S.C. 1987), ("Failure to adduce expert testimony on competitive issues such as market definition augurs strongly in favor of granting summary judgment against an antitrust plaintiff," aff'd mem, 846 F.2d 70 (4th Cir. 1988); *Morgan, Strand, Wheeler & Biggs v. Radiology Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991) (market definition is a "highly technical economic question"); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 98 F.Supp.2d 729, 736 (W.D. Va. 2000).

9. *Lantec*, 146 F.Supp.2d at 1148.

10. Expert analysis may be even more critical to defining the market contours and product interchangeability when sophisticated technology is involved. See, e.g., *Hynix Semiconductor v. Rambus, Inc.*, 2008 WL 73689 at *10 n.13 (N.D. Cal. Jan. 5, 2008) (in a case involving the semiconductor industry, the court held that "[g]iven the complexity of the task, a jury cannot conclude that two technologies are 'close substitutes' and hence comprise a relevant technology market without expert testimony").

11. See, e.g., *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008) (holding that courts cannot certify a class by simply accepting a plaintiff expert's articulated market and common impact analysis, but must also consider and resolve conflicting issues raised by defense experts).

12. See, e.g., *In re Fresh Del Monte Pineapples Antitrust Litig.*, 2009 WL 3241401 at *9 (S.D.N.Y. Sept. 30, 2009) ("[e]ven if the Court were to consider [the expert's] testimony, the Court concludes that Plaintiffs have failed to raise a triable issue of fact regarding the boundaries of the product market").

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